

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD DALE THAYER,

Defendant-Appellant.

UNPUBLISHED

July 23, 2009

No. 281326

Branch Circuit Court

LC No. 05-078312-FH

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of using the Internet to communicate with a person for the purpose of attempting to commit third-degree criminal sexual conduct, MCL 750.145d(2)(f), and sentenced to five years' probation, with 360 days to be served in jail. He appeals as of right. We affirm.

Defendant's conviction arises from his communication with a 13-year-old girl in an Internet chat room. In response to a request for information by defendant, the girl sent defendant a message that identified her age and sex. Defendant responded that he was 36 years old, and that he liked little girls and wanted to teach her things that her parents could not teach her. The girl did not respond to this message, but informed her mother and a friend about the communication. Thereafter, the girl's mother contacted the defendant using the screen name of a fictitious 15-year-old girl and arranged for a meeting with defendant. State police troopers arrested defendant after he arrived for the meeting. During trial, the prosecution introduced evidence that defendant admitted to state troopers that he wanted to meet with minors for a sexual encounter. Defendant denied having any interest in minors, and further contended during the trial that he believed when he arrived for the prearranged meeting that he would be meeting with an adult.

Following closing arguments the trial court instructed the jury, in part, as follows:

"I've prepared verdict forms listing the possible verdicts in this case, and the verdict form will go with you into the jury room. After the caption...the verdict form reads as follows, and please pay close attention: "After deliberations, when the jury has reached an unanimous verdict, ...the foreperson must indicate that verdict on the form below by marking one box only. ...[A]s to all counts, "We, the jury, find the defendant not guilty." The second possible box

that you can find and mark is “We, the jury, find the defendant guilty of using the internet or computer to communicate with [the victim] for the purpose of attempting to commit criminal sexual conduct in the third degree.” And the third possible box is “We, the jury, find the defendant guilty of accosting, enticing or soliciting [the victim] with the intent to induce or force her to commit an immoral act, to submit to an act of intercourse or an act of gross indecency or other act of depravity or delinquency or to encourage her to engage in one of those acts.” Once again, the jury, after an unanimous verdict, should have only one of three boxes marked....”

Before instructing the jury, the trial court discussed with counsel whether it should instruct the jury that the accosting charge represented a lesser included offense of the charge that involved using the internet for the purpose of attempting to commit third degree criminal sexual conduct. The trial court concluded that the jury could be confused by such an instruction, and therefore, did not so instruct the jury.

When the jury reached its verdict, the following occurred:

Clerk: Members of the jury, if you have agreed upon a verdict, who will speak for you?

Jury Foreperson: I will.

Clerk: Please rise. What is your verdict?

Jury Foreperson: Guilty on both counts.

The Court: Well, there’s only one box.

Jury Foreperson: Okay, guilty.

The Court: Okay. Thank you. So as to count one, then, it is – or the first—the middle box there is—

Jury Foreperson: (Inaudible).

Clerk: Would the entire jury please—

The Court: Well, hang on a sec. We got to make sure that is correct. So it’s—on the bottom on you have made—checked the box?

Jury Foreperson: Yes.

The Court: Okay, thank you.

The Clerk then read the jury’s verdict as finding the defendant guilty of the accosting charge, and asked the jury whether this was its verdict. The jury agreed that it was. The trial court then asked defense counsel if he wanted the jury polled, and defense counsel requested the same. Before the jurors could be individually polled, however, the jury foreperson indicated that

there was some confusion with the jury's verdict. The trial court stated that it "wanted to be sure that there isn't any misunderstanding and perhaps a discrepancy between what the jury indicated [was its verdict] and what was checked in the box." The jury was instructed to return to the jury room and write a note to the trial court indicating what the jury's confusion was. The jury's note read "[i]f we thought he was guilty of both which one do we pick, and what is the difference between the two?" Over defendant's objection, the trial court reinstructed the jury and directed the jury to resume deliberations with a modified verdict form, which indicated that the jury could find the defendant not guilty, *or* guilty of attempted third degree criminal sexual conduct, *or* guilty of the accosting charge. After additional deliberations, the jury returned a guilty verdict on the attempted third degree criminal sexual conduct charge.

Defendant's sole claim on appeal is that the trial court erred when, rather than enter judgment on the jury verdict as indicated by the foreperson and the jury as a whole, and as reflected on the initial verdict form, it instead reinstructed the jury, provided the jury with a modified verdict form, and permitted the jury to deliberate further on its verdict. We disagree. A defendant may not sustain a challenge to the jury polling procedure used by the trial court unless the process is shown to have had a coercive effect on the jury. *People v Wilson*, 390 Mich 689, 691-692, 213 NW2d 193 (1973).

MCR 6.420(A) requires that the jury return its verdict in open court. The verdict does not become final until it is accepted by the trial court. *People v Henry*, 248 Mich App 313, 319; 639 NW2d 285 (2001), lv den 465 Mich 969 (2002); *People v McGee*, 247 Mich App 325, 339; 636 NW2d 531 (2001), vacated on other grounds 469 Mich 956 (2003). "The judge has a right to clarify the form of the verdict if the jury has not been discharged; and the jury can always change the form and the substance of the verdict to coincide with its intention, before it is discharged." *People v McNary*, 43 Mich App 134, 143; 203 NW2d 919 (1972), affirmed in part, rev'd in part on other grounds 388 Mich 799 (1972).

The trial court may also give appropriate additional instructions during jury deliberations, MCR 6.414(H), but must guard against coercion. See *People v Sullivan*, 392 Mich 324, 334; 220 NW2d 441 (1974); *People v Wilson*, 390 Mich 689; 213 NW2d 193 (1973). The trial court's decision to provide additional instructions is generally reviewed for an abuse of discretion. *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974), overruled in part on other grounds by *People v Woods*, 416 Mich 581, 621 n 12; 331 NW2d 707 (1982), cert den 462 US 1134; 103 S Ct 3116; 77 L Ed 2d 1370 (1983). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

Where a jury expresses confusion on a point of law, it is incumbent on the trial court "to guide the jury by providing a 'lucid statement of the relevant legal criteria.'" *Martin, supra* at 558, quoting *Bollenbach v United States*, 326 US 607, 612; 66 S Ct 402; 90 L Ed 350 (1946). A trial court has a duty to clear up uncertainty brought to its attention. *United States v Nunez*, 889 F2d 1564, 1568 (CA 6, 1989). The propriety of the response is measured by whether it fairly responds to the jury's request, without creating prejudice. *Id.* "Jury instructions are to be read as a whole rather than extracted piecemeal to establish error." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002), lv den 467 Mich 943 (2003). Even if somewhat imperfect, reversal is not warranted if jury instructions fairly present the issues and sufficiently protect the defendant's rights. *Id.*

The record supports the trial court's finding that the jury was confused about what it could do when it believed that defendant was guilty of both charges, but was only permitted to return a verdict on one of the charges by checking only one box on the verdict form. The fact that only one box on the verdict form was checked did not preclude a finding of confusion, inasmuch as the form was inconsistent with the foreperson's announcement that the jury found defendant guilty of both counts. "The written form of the verdict should not be exalted over the substantive intent of the jury." *People v Rand*, 397 Mich 638, 643; 247 NW2d 508 (1976), mod 399 Mich 1040 (1977). Indeed, defendant concedes on appeal that the trial court arguably acted in accordance with its duties by asking the jury to write a note explaining any confusion.

The trial court appropriately exercised its discretion in determining that additional instructions, and an opportunity for the jury to consider a modified verdict form containing the disjunctive word "or" to separate the three verdict options, were warranted in light of the jury's question about which charge they could select if they felt defendant was guilty of both charges. The trial court's explanation to the jury, that the charges indicated on the verdict form were "really alternative charges" and that defendant "cannot be found guilty of both charges," properly instructed the jury on the law and did not suggest a particular verdict or otherwise caused prejudice. Contrary to defendant's contention, the trial court's additional instructions to the jury were sufficient to protect defendant's rights. *Kurr, supra* at 327.

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Kurtis T. Wilder